

No. 82397-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DOUG AND BETH O'NEILL, individuals,

Plaintiffs/Appellants,

v.

CITY OF SHORELINE, a Washington municipal corporation, and
DEPUTY MAYOR MAGGIE FIMIA, individually and in her official
capacity,

Defendants/Respondents.

^{PETITIONER}
SUPPLEMENTAL BRIEF OF DEFENDANT/RESPONDENT CITY
OF SHORELINE

CITY OF SHORELINE

Flannary P. Collins, WSBA No. 32939
Attorney for Respondent City of Shoreline
17544 Midvale Avenue North
Shoreline, WA 98113
Telephone: (206) 801-2223
Facsimile: (206) 546-2200

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I. INTRODUCTION

Whether metadata is subject to public disclosure is a novel and evolving area of law. Indeed, Division I's opinion represents the first instance in a published case, nationwide, where a court has held that metadata is subject to a state public records law.¹ The uncertainty surrounding metadata as a public record was reflected in Judge Cox of Division I's comment during oral argument of this case that, before reading the briefs, he did not even know what metadata was. The same was true in 1972, when the people enacted the Public Records Act, codified at Chapter 42.56 RCW ("PRA").

Metadata is data about data – data that is automatically generated when electronic records are created, documenting the history of the record. *O'Neill v. City of Shoreline*, 145 Wn. App. 913, 919, 187 P.3d 822 (2008). At issue in this case is the "header" metadata, which is the metadata associated with the header information in an email and includes a history of the sender, recipient, sent date and time, path receipt information, and subject line.² Header metadata is automatically generated by a computer

¹ After Division I's 2008 decision, the Arizona Court of Appeals decided *Lake v. City of Phoenix*, 207 P.3d 725 (Ariz. App. Div. 1), review granted in part (June 1, 2009), distinguished *O'Neill v. City of Shoreline* and held that metadata is not a public record. As of this filing, no other cases in Washington or otherwise have dealt with the issue of whether metadata is a public record.

² Registration of Mail and MIME Header Fields, Document 4021, prepared by the Internet Engineering Task Force, available at "<http://tools.ietf.org/html/rfc4021>" (last visited June 29, 2009).

without input from the user.³ As described by the only other court in the nation to address metadata as a public record under state law, metadata is generated only as a “by-product” of an individual’s use of a computer. *Lake v. City of Phoenix*, 207 P.3d 725 at ¶13.

Under the PRA, a public record is defined as: (1) any writing (2) containing information relating to the conduct of government or the performance of any governmental or proprietary function (3) prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. RCW 42.56.010(2). The questions raised by this case are what duty public agencies have to preserve metadata and under what circumstances duplicate copies of metadata from identical emails qualify as unique public records based on minor technical differences in the metadata. Specifically, this case raises issues related to the interaction between the PRA and records retention requirements under Chapter 40.14 RCW, and the extent of the authority provided by the Secretary of State’s Retention Schedule and Records Management Guidelines (“State Retention Guidelines” or “Guidelines”) for an agency’s retention and disposal of public records.⁴

³ The Sedona Principles 2nd. Ed. (Sedona Conference Working Group Series 2007) at 3.

⁴ The City’s response to the issues raised by the O’Neills in their cross-petition for review are set forth in the City’s briefs submitted to Division I and are not included in this supplemental brief.

The one record at issue in this case is the metadata associated with an email received by both Maggie Fimia, the Deputy Mayor at the time of the request, and Councilmember Janet Way. Although the City provided Ms. O'Neill with the metadata associated with Ms. Way's copy of the email and metadata from a re-sent copy of the same email, the City was unable to provide the metadata associated with Ms. Fimia's identical copy of the email. The O'Neills filed suit based solely on the City's inability to produce this third version of the metadata for the same email.

II. STATEMENT OF THE CASE

The City adopts and incorporates the statement of facts from Division I's opinion, except for one omission and one correction. For ease of reference, the facts pertinent to issues in this brief are set forth below.

The email at issue in this case is an email critical of the Shoreline City Council that was forwarded by blind carbon copy⁵ to Shoreline's former Deputy Mayor, Maggie Fimia, and to at least one other member of the City Council (Janet Way), by a political supporter, Lisa Thwing. CP Sub 4 Exhibit J at 21 (Declaration of Beth O'Neill)⁶; CP Sub 4 Exhibit L

⁵ Division I omitted the fact that Ms. Fimia and Ms. Way were blind carbon copied on the email from Ms. Thwing.

⁶ The trial court converted Beth O'Neill's declaration to an exhibit and this exhibit was not contained in the court's record. Division I referred to O'Neill's declaration as "Clerk's Papers Sub 4." The City also refers to O'Neill's declaration as "Clerk's Papers Sub 4."

at 4-6; CP 39. Ms. Thwing's forwarded email received by Ms. Fimia and

Ms. Way reads as follows:

----- Forwarded Message

From: "Lisa Thwing" <tootrd@comcast.net>

Date: Mon, 18 Sep 2006 07:55:38 -0700

To: "Lisa Thwing" <tootrd@comcast.net>

Subject: Current city council meeting being broadcast this week

From: Diane Hettrick <mailto:dhettrick@earthlink.net>

Sent: Thursday, September 14, 2006 11:40 PM

Subject: Current city council meeting being broadcast this week

From my friend Judy:

Hi Folks,

My dear friend, Beth O'Neill has asked me to pass along information about our dysfunctional Shoreline City Council. Beth and some other folks have been working hard battling certain issues regarding an illegal rental in their neighborhood. What should be a legal and zoning issue has gotten mired into the politics of our 32nd District Democrats and certain City Council folks are playing favorites with their own political supporters.

Anyway, try to watch the latest Council meeting (it airs at noon and 8pm every day on channel 21) and try to attend the next Council meeting at 6:30 next Monday in the Rainier Room at the Shoreline Center. Beth has also asked me to let folks know that if they have any questions to give her a call at: 546-5672 and to pass along the request for lots of people to show up at the next Council meeting.

Judy

Coincidentally, I talked to Beth today and then read the statement she presented to the city council. This is very interesting and highly entertaining and I do suggest that you make an effort to watch the city council meeting this week. (Now if I could just get my channel switched off of Lake Forest Park)

Diane

----- End of Forwarded Message

CP Sub 4 Exhibit J at 21-22.

As the text reflects, Diane Hettrick embedded a message from Judy Simon⁷ into an email, adding her own commentary at the end of the Simon

⁷ Judy Simon indicated she was the author of the original email pasted into the Hettrick email. CP Sub 4 Exhibit B-1 at 3.

message (hereafter "Hettrick email"). Ms. Thwing received the Hettrick email, forwarded it to herself without adding any additional text, and blind carbon copied recipients including Ms. Fimia and Ms. Way (hereafter "Thwing-Hettrick email"). CP 20; CP 39; CP Sub 4 Exhibit L at 4-6. Under this blind carbon copy choice of transmittal, only Ms. Thwing appears on the recipient line. CP 20; CP 38-39. The blind carbon copied recipients do not appear either in email itself or in the metadata.⁸ CP 20; CP 24-28.

Ms. Fimia mentioned that she had received the Hettrick email and questioned its veracity at a City Council meeting. CP Sub 4 Exhibit B-1 at 1. Beth O'Neill, who was mentioned in the email and by Ms. Fimia at the meeting, requested a copy of "that email" referenced by the Ms. Fimia. CP Sub 4 Exhibit B-1 at 2. In response to Ms. O'Neill's request for "that email," Ms. Fimia provided the Hettrick email. CP 21. In providing the Hettrick email, Ms. Fimia removed the following Lisa Thwing header forwarding information:

From: "Lisa Thwing" <tootrd@comcast.net>
Date: Mon, 18 Sep 2006 07:55:38 -0700
To: "Lisa Thwing" <tootrd@comcast.net>
Subject: Current city council meeting being broadcast this week

⁸ The blind carbon copied recipients do not appear in the metadata, as tested by Tho Dao, the City's Manager of Information Services. Recreating Ms. Thwing's method of sending the email, Mr. Dao sent an email from himself to himself, and blind carbon copied Ms. Fimia and other City staff. CP 24. When he printed the metadata from Ms. Fimia's computer, only Ms. Fimia's email address and her husband, who set up the email system, appeared in the metadata. CP 24-25. City staff addresses did not appear. CP 25.

Id.

Thus, Ms. Fimia did not disclose who had forwarded the Hettrick email, but it was only the Hettrick email that was requested.

After receipt of the Hettrick email without the Thwing forwarding information, Ms. O'Neill clarified that she desired the email with all forwarding information. CP Sub 4 Exhibit F. Ms. Fimia subsequently forwarded the complete Thwing-Hettrick email electronically to the City Attorney for production. CP 22; CP Sub 4 Exhibit J at 21. At some point after forwarding the email, Ms. Fimia deleted her electronic copy of the email. CP 22. The City printed out the complete Thwing-Hettrick email and provided it to Ms. O'Neill. CP 21.

After receiving the printed copy of the complete Thwing-Hettrick email, Ms. O'Neill filed a public records request for the Thwing-Hettrick email's metadata. CP 22; CP Sub 4 Exhibit G. In responding to Ms. O'Neill's request for metadata, the City discovered that the email forwarded to the City Attorney no longer had the associated metadata. CP 34 (Declaration of Records and Information Manager Carol Shenk indicating no more responsive records existed). In addition, the City could not retrieve the metadata from Ms. Fimia's electronic copy as she had deleted her electronic copy prior to receiving staff's request to provide the

metadata from her computer.⁹ CP 22. However, the City was able to provide the email metadata from the Thwing-Hettrick email received by Ms. Way in addition to the metadata from a second copy of the Thwing-Hettrick email forwarded by Ms. Thwing. CP Sub 4 Exhibit L. Unable to locate the electronic copy of the Thwing-Hettrick email on her computer, Ms. Fimia requested Ms. Thwing forward the email to her a second time. CP Sub 4 Exhibit J at 19. Ms. Thwing did so on September 30 and the City also provided the email metadata from this second copy of the Thwing-Hettrick email. CP 22; CP 34; CP Sub 4 Exhibit L.

Despite being provided with two separate versions of the Thwing-Hettrick email metadata, the O'Neills filed suit because they did not receive a third version of the Thwing-Hettrick email metadata, specifically the email metadata from Ms. Fimia's original copy of the Thwing-Hettrick email. The City did not violate the PRA. Indeed, Ms. Fimia's and the City's actions in forwarding, printing, and subsequently deleting the electronic copy of the email were consistent with the State Retention Guidelines. The State Retention Guidelines in existence at the time of Ms.

⁹ Referencing Sub 4 Exhibit J at 27, Division I incorrectly suggests that Ms. Fimia may have possessed an electronic version of the complete Hettrick-Thwing email on September 26, after receipt of O'Neill's request for metadata. The document referred to by Division I is the metadata for Ms. Fimia's *modified* copy of the email without the Thwing recipient/sender lines. CP 21, ¶10; compare metadata at CP Sub 4 Exhibit J at 27 to modified email at Sub 4 Exhibit J at 1. At most, the record shows Ms. Fimia possessed the modified version of the email (and metadata) on September 26.

O'Neill's 2006 metadata request explicitly authorized deletion of the electronic copy of public record emails as long as the emails were printed along with the following information: name of sender, name of recipient and date and time of transmission and/or receipt. CP 36; CP 92.

III. ARGUMENT

A. The City Complied with the O'Neills' Public Records Requests Fully and Completely.

The O'Neills' claim that the City violated the PRA revolves around one record: Maggie Fimia's version of the metadata for the Thwing-Hettrick email. In response to Ms. O'Neill's request for metadata pertaining to the email, the City produced two versions of this metadata: (1) Ms. Way's version of the metadata pertaining to the Thwing-Hettrick email; and (2) metadata for the Thwing-Hettrick email forwarded by Ms. Thwing on a second occasion. CP Sub 4 Exhibit L at 4-6 and 1-3. The City was unable to provide Ms. Fimia's original version of the metadata since the electronic copy of the email, and hence the metadata, had been deleted in compliance with state law.

1. Ms. Fimia's Actions in Forwarding and Subsequently Deleting the Email Complied with State Law

The option of printing a hard copy of an email and subsequently deleting the electronic version was explicitly authorized by the PRA, Chapter 40.14 RCW (Preservation and Destruction of Public Records),

and the State Retention Guidelines. The PRA, Chapter 40.14 RCW and the State Retention Guidelines must all be read together to understand the full extent of the City's duties to retain and disclose public records.

The PRA recognizes an agency's authority to destroy records pursuant to retention guidelines (referred to as a "schedule for destruction"). RCW 42.56.100.

RCW 40.14.060 requires use of the retention schedule for disposition of records: "Any destruction of official public records shall be pursuant to a schedule approved under RCW 40.14.050."

The State Retention Guidelines, approved and issued in accordance with RCW 40.14.050 and .070 by the Local Records Committee¹⁰ and the Washington State Archives and Records Management Division (in the Office of the Secretary of State), state:

E-mail records should be filed with the appropriate records series and be disposed of according to the retention period approved for that records series on either the general records retention schedule or a records retention schedule approved specifically for the agency by the Local Record Committee.

CP 58; CP 90.

The Guidelines define the general records retention schedule as:

A schedule, listing and assigning minimum retention

¹⁰ The Local Records Committee is composed of the archivist, an appointee of the state auditor, an appointee of the attorney general, and an appointee of the director of financial management. RCW 40.14.050.

periods to individual records series, which is approved for all local government agencies, or particular agencies, by the Local Records Committee. General records retention schedules provide the agencies they cover with continuing blanket authority for the disposition of commonly held records according to their assigned retention periods.

CP 106.

The general records retention schedule stated:

E-mail messages with public record content should be retained in e-mail format only as long as they are being worked on or distributed. Upon completion, email messages containing public record information should be printed out or transferred to an electronic document managing system, and retained for the minimum retention period assigned by the Local Government General Records Retention Schedule or a records retention schedule approved specifically for the agency by the Local Records Committee.

CP 36.

In the section entitled "Frequently Asked Questions about E-Mail Retention," the Guidelines answer the question "Can I print messages, and then delete them?" as follows:

Yes, provided you print the following information with the message: name of sender, name of recipient, date and time of transmission and/or receipt. You then file the printed messages with the appropriate records series and retain it according to the retention approved for that series by the Local Records Committee.

CP 91.

The Attorney General's model rules for the PRA emphasize the close relationship between the Guidelines and the PRA. Adopted at the direction of the state legislature¹¹, the purpose of the model rules is to "provide information to records requestors and state and local agencies about "best practices" for complying with the Public Records Act." WAC 44-14-0001. The model rules' section on retention of records begins with the basic proposition that "An agency is not required to retain every record it ever created or used." WAC 44-14-03005. The rules then direct that "Once a request has been closed, the agency can destroy the requested record in accordance with its retention schedule." WAC 44-14-04003.¹²

Ms. Fimia complied with state law in deleting the electronic version of the email after forwarding the email for production. Following the "blanket authority" of the retention schedule, the hard copy of the Thwing-Hettrick email retains all information required to be retained under the State Retention Guidelines: (1) name of the sender (Lisa Thwing); (2) name of the recipient (Lisa Thwing and blind carbon copied recipient Maggie Fimia); and (3) date of transmission (Mon, 18 Sep 2006, 07:55:38). CP Sub 4 Exhibit J at 21.

¹¹ WAC 44-14-0001

¹² See also WAC 44-14-0005, -04005 and -04006 (all referencing retention requirement)

2. At Most, Metadata is Public Record With No Retention Value.

The direction from the State Retention Guidelines to print and delete categorized metadata as, at most, a public record with no retention value. Public records with no retention value are documents that may be disposed of as soon as they have served their purpose.¹³

Envelopes, a public record under the PRA, are disposed of once the envelope has served its purpose of delivering the letter to the City. Metadata is analogous to envelopes and should be treated accordingly. Envelopes, like metadata, are associated with another public record (i.e., the letter) and track that record's path through the postal system rather than the internet. In most business letters, just like emails, the body of the letter will identify the sender and recipient, and their respective addresses. This information will also be on the envelope. The same is true for emails – the body of the email will contain the name and address information that is effectively duplicated in the header metadata. Yet no one would suggest that a public agency must save every envelope, unless the postmark meets some need of the agency. And certainly, when identical letters are sent to a single agency, no one would argue that the agency

¹³ E.g., Letters of transmittal and routing slips. LOCAL GOVERNMENT COMMON RECORDS RETENTION SCHEDULE, Office of the Secretary of State – Washington State Archives at 11-12. http://www.secstate.wa.gov/_assets/archives/RecordsManagement/CORE10.pdf

must keep each envelope simply because the name of the recipient on the envelope will differ.

Similar to envelopes, metadata is disposed of, consistent with the Guidelines, once the email has arrived in the individual's inbox and a compliant hard copy retained. Categorizing metadata as having "no retention value" is consistent with the Guidelines' direction to delete the electronic version of the email after printing and retaining the hard copy.

3. It Is Outside the Scope of the PRA to Require a Hard Drive Search.

On remand, Division I directed the trial court and the City to complete a search of Ms. Fimia's hard drive in order to locate the metadata. *O'Neill* at 936. This search is outside the scope of the PRA. First, a court cannot force an agency to conduct a hard drive search to locate a record that was properly deleted in compliance with the law. Second, the PRA requires production of "identifiable public records." RCW 42.56.080. An identifiable record is one that agency staff can "reasonably locate." *Bonamy v. City of Seattle*, 92 Wn. App 403, 410, 960 P.2d 447 (1998); WAC 44-14-04002(2). A requester has no right to search through agency files to locate records after an agency fails to locate the requested record. *Sperr v. City of Spokane*, 123 Wn. App 132, 136-37, 96 P.3d 1012 (2004). Similarly, a requester has no right to search through

agency hard drives – or have the court make such a search. The Attorney General has unambiguously stated that records considered “reasonably locatable” are records that “can be located with typical search features and organizing methods contained in the agency’s current software.” WAC 44-14-05002. If a record is legally deleted, like the metadata at issue in this case, an agency cannot be required at great expense to extract deleted fragments from a hard drive.

B. The City Produced Metadata That Related to the Conduct of Government.

1. All Information “Related to the Conduct of Government” Appears in the Email and the Metadata Provided.

The O’Neills’ position is that they have a right to all copies of metadata because each copy of metadata is distinct. But, the O’Neills were provided with the requested metadata associated with the Thwing-Hettrick email when it produced the metadata for the Way copy and the copy Thwing re-sent to Ms. Fimia (hereafter “re-sent email”). The original hard copy of the email, Janet Way’s metadata for the Thwing-Hettrick email, and the metadata for the re-sent email provided the O’Neills with all information related to the conduct of government, including the one portion identified by Division I: “email addresses of persons who may have knowledge of alleged government improprieties in dealing with a zoning matter.”

As shown in the Way metadata and the metadata for the re-sent email, both of which are in the record and appended to this brief¹⁴, the metadata at issue can be broken down into three separate parts, delineated by the term "NextPart" in both versions: (1) header information, which includes the sender/recipient, date/time, and email delivery path¹⁵; (2) text of email¹⁶; and (3) text of email in HyperText Markup Language (HTML) or other similar markup language¹⁷.

The second and third parts of the Way metadata and the re-sent email metadata are virtually identical, except the re-sent version reflects that the entire Thwing-Hettrick email was re-sent to Ms. Fimia.¹⁸ Based on this, one can conclude that the second and third parts of Ms. Fimia's original version of the metadata would be identical to the Way metadata.

At issue in this case is the header metadata, the first part of the metadata. The header metadata associated with the re-sent email would be identical to the metadata in Ms. Fimia's original copy of the email with three exceptions:

- 1) The date and time (Exhibit 2, lines 3, 5-7, and 11);

¹⁴ For ease of reference, the Way metadata and the re-sent Thwing metadata have been appended as Exhibit 1 and Exhibit 2, respectively. Each line of the metadata has been numbered for reference purposes.

¹⁵ Exhibit 1, lines 1-18; Exhibit 2, 1-20.

¹⁶ Exhibit 1, lines 19-45; Exhibit 2, lines 21-52.

¹⁷ Exhibit 1, lines 46-109; Exhibit 2, lines 53-124.

¹⁸ Exhibit 2, lines 24-28 and 71-78.

- 2) The “path” the email took (Exhibit 2, lines 5-7); and
- 3) The recipient on the “to” line (Exhibit 2, line 9)¹⁹.

The Way metadata provides two of the three pieces of this missing information. The Way metadata provides the same date and almost exactly the same time as Ms. Fimia’s version of the metadata,²⁰ as Ms. Fimia and Ms. Way received the email as part of the same mailing from Ms. Thwing. In addition, both versions of metadata would have the same recipient (“to” Lisa Thwing), as both Ms. Way and Ms. Fimia were blind carbon copied. This means the only portion of Ms. Fimia’s original version of the metadata the City did not produce was the “path” information. The “path” does not in any way relate to the conduct of government and is almost randomly generated, making it essentially meaningless. The O’Neills are not missing any information related to the conduct of government. Accordingly, because the PRA only required the City to produce a copy of the metadata, if available, the City exceeded its legal obligation by producing the Way metadata and the re-sent metadata.

¹⁹ Ms. Fimia was blind carbon copied on the original version; Ms. Thwing sent the second version to Ms. Fimia directly. CP 39; CP 22.

²⁰ Because the emails took different paths to reach Ms. Fimia and Ms. Way, it is possible that there may have been a minor difference between the times in the metadata, but this difference would be at most a matter of seconds, and not material.

C. If This Court Finds That All Metadata is a Public Record, the Law Should Be Applied Prospectively.

If this Court disagrees with the City's position and concludes that all metadata relates to the conduct of government and each version of metadata is a unique public record, this conclusion should not apply to the City retroactively. Appellate courts can apply opinions prospectively after considering: (1) whether the decision establishes a new rule of law by overruling clear past precedent or deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether retroactive application would further or retard the purposes of the new rule; and (3) whether retroactive application would be inequitable. *State v. Atsbeha*, 142 Wn.2d 904, 916, 16 P.3d 626 (2001); *Lau v. Nelson*, 92 Wn.2d 823, 827-29, 601 P.2d 527 (1979) (applying new rule prospectively).

In a recent 2006 decision, this Court, finding a disciplinary rule impermissibly vague, prospectively applied its new interpretation of a disciplinary rule due to "the absence of a prior decision from this court, along with the presence of conflicting or equivocal authority from other jurisdictions and legal commentaries." *In re Disciplinary Proceeding Against Haley*, 156 Wn.2d 324, 338, 126 P.3d 1262 (2006).

Here, no prior decision in the nation has held that metadata is subject to a state public records law, and the direction from state law and

the State Retention Guidelines conflicts with Division I's opinion. Retroactively imposing a new requirement to retain all versions of an email's metadata would be inequitable based on the Guidelines' direction to the City to print and delete emails, and not retain and archive metadata.

The O'Neills received two versions of metadata associated with the Thwing-Hettrick email and the one technical piece of information not provided was the "path" the email took to reach Ms. Fimia's inbox. This "path" information is not related to the conduct of government. Punishing Shoreline taxpayers by requiring payment of daily penalties for a failure to provide a technical piece of information, not related to the conduct of government, would be unreasonable and inequitable.

D. The O'Neills Are Not Prevailing Parties Under the PRA and an Award of Attorney Fees is Premature.

Division I's direction to award attorney fees on remand without finding whether the PRA had been violated is a significant and erroneous departure from previous Supreme Court rulings in *Concerned Ratepayers Ass'n v. Pub. Utility Dist. No. 1*, 138 Wn.2d 950, 964, 983 P.2d 635 (1999) and *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005).

The only basis for awarding attorney fees is when a party prevails under the statute:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

RCW 42.56.550(4).

The Supreme Court has repeatedly held that a violation of the PRA must be found prior to declaring that a party has prevailed and that attorney fees are owed. In *Concerned Ratepayers Ass'n*, the Court found that, although the document withheld by the City was a public record, the trial court needed to determine whether the document should have been disclosed or whether the document was exempt from public disclosure. 138 Wn. 2d 950 at 964. Since the Court remanded the issue of whether a PRA violation had occurred, it also remanded the question of attorney fees and penalties. Id. In *Spokane Research & Defense Fund v. City of Spokane*, the court remanded to the trial court the issue of whether attorney fees were owed, stating:

[The appellant] has not yet had a court review all of the documents and determine if they were properly withheld from the outset. If he prevails on that point, he is entitled to fees and penalties even if his action did not cause the disclosure.

155 Wn.2d 89 at 103.

The same is true here. Division I did not find the City violated the PRA. Rather, it remanded the issue to the trial court, stating:

[T]he trial court must determine, consistent with this opinion, whether the City's deletion of the metadata violated the PRA. Where appropriate, the trial court should determine the appropriate monetary penalty under the PRA.

O'Neill v. City of Shoreline at 935.

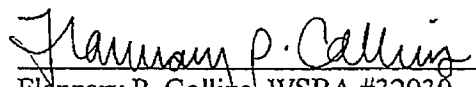
Here, since the deletion did not violate the PRA, no penalty and no attorney fees are owed. Even if this Court sustains the remand, declaring a requester a prevailing party and awarding attorney fees cannot be made until a PRA violation is found.

IV. CONCLUSION

The State Retention Guidelines' direction to local agencies, issued by those agencies charged with administering the PRA (the archivist, the secretary of state and the attorney general), was to "print and delete" email. By producing the hard copy of the email and subsequently deleting the email, the Deputy Mayor and the City followed the Guidelines and complied with the PRA. By producing the two separate versions of metadata, the City exceeded its duty under the PRA. The City respectfully requests that this Court reverse Division I and reinstate the decision of the trial court finding no violation of the PRA.

RESPECTFULLY SUBMITTED this 29th day of June, 2009.

CITY OF SHORELINE



Flannery P. Collins, WSBA #32939
Attorney for Respondent City of Shoreline

APPENDIX

EXHIBIT 1

1. X-Apparently-To: janetway@yahoo.com via 206.190.36.126; Mon, 18 Sep 2006 07:55:31 -0700
2. X-Originating-IP: [204.127.225.92]
3. Authentication-Results: mta182.mail.re2.yahoo.com
from=comcast.net; domainkeys=neutral (no sig)
4. Received: from 204.127.225.92 (EHLO alnrmhc12.comcast.net) (204.127.225.92)
by mta182.mail.re2.yahoo.com with SMTP; Mon, 18 Sep 2006 07:55:30 -0700
5. Received: from computer1 (c-71-231-156-105.hsd1.or.comcast.net[71.231.156.105])
by comcast.net (alnrmhc12) with SMTP
id <20060918145528b12000a99fe>; Mon, 18 Sep 2006 14:55:30 +0000
6. From: "Lisa Thwing" <loolrd@comcast.net>
7. To: "Lisa Thwing" <loolrd@comcast.net>
8. Subject: Current city council meeting being broadcast this week
9. Date: Mon, 18 Sep 2006 07:55:38 -0700
10. MIME-Version: 1.0
11. Content-Type: multipart/alternative;
boundary="====_NextPart_000_001E_01C6DAF7.D46601B0"
12. X-Priority: 3 (Normal)
13. X-MSMail-Priority: Normal
14. X-Mailer: Microsoft Outlook IMO, Build 9.0.2416 (9.0.2910.0)
15. X-MimeOLE: Produced By Microsoft MimeOLE V6.00.2900.2962
16. Importance: Normal
17. Content-Length: 1760
18. This is a multi-part message in MIME format.
19. =====_NextPart_000_001E_01C6DAF7.D46601B0
20. Content-Type: text/plain;
charset="Windows-1252"
21. Content-Transfer-Encoding: 8bit
22. From: Diane Heltrick
23. Sent: Thursday, September 14, 2006 11:40 PM
24. Subject: Current city council meeting being broadcast this week
25. From my friend Judy:
26. Hi Folks,
27. My dear friend, Beth O'Neill has asked me to pass along information about
28. our dysfunctional Shoreline City Council. Beth and some other folks have
29. been working hard battling certain issues regarding an illegal rental in
30. their neighborhood. What should be a legal and zoning issue has gotten
31. mired into the politics of our 32nd District Democrats and certain City
32. Council folks are playing favorites with their own political supporters.
33. Anyway, try to watch the latest Council meeting (it airs at noon and 8pm
34. every day on channel 21) and try to attend the next Council meeting at 6:30
35. next Monday in the Rainier Room at the Shoreline Center. Beth has also asked
36. me to let folks know that if they have any questions to give her a call at:
37. 546-5672 and to pass along the request for lots of people to show up at the
38. next Council meeting.
39. Judy
40. Coincidentally, I talked to Beth today and then read the statement she

41. presented to the city council. This is very interesting and highly
42. entertaining and I do suggest that you make an effort to watch the city
43. council meeting this week. (Now if I could just get my channel switched off
44. of Lake Forest Park)
45. Diane

46. —=_NextPart_000_001E_01C6DAF7.D46601B0

47. Content-Type: text/html;
charset="Windows-1252"

48. Content-Transfer-Encoding: quoted-printable

49. <!DOCTYPE HTML PUBLIC "-//W3C//DTD HTML 4.0 Transitional//EN">

50. <HTML><HEAD>

51. <META http-equiv=3DContent-Type =

52. content=3Dtext/html; charset=3DWindows-1252>

53. <STYLE></STYLE>

54. <META content=3D"MSHTML 6.00.2900.2963" name=3DGENERATOR></HEAD>

55. <BODY id=3DMailContainerBody=20

56. style=3D"PADDING-LEFT: 10px; FONT-WEIGHT: normal; FONT-SIZE: 10pt; =

57. COLOR: #000000; BORDER-TOP-STYLE: none; PADDING-TOP: 15px; FONT-STYLE: =

58. normal; FONT-FAMILY: Verdana; BORDER-RIGHT-STYLE: none; =

59. BORDER-LEFT-STYLE: none; TEXT-DECORATION: none; BORDER-BOTTOM-STYLE: =

60. none"=20

61. leftMargin=3D0 topMargin=3D0 name=3D"Compose message area" =

62. CanvasTabStop=3D"true"=20

63. acc_role=3D"text">

64. <DIV> </DIV>

65. <DIV>

66. <DIV style=3D"FONT: 10pt arial; PADDING-TOP: 10pt">

67. <DIV>From: <A title=3Dmailto:dhetttrick@earthlink.net=20

68. href=3D"mailto:dhetttrick@earthlink.net">Diane Hetttrick </DIV>

69. <DIV>Sent: Thursday, September 14, 2006 11:40 PM</DIV>

70. <DIV>Subject: Current city council meeting being broadcast this=20

71. week</DIV></DIV>

72. <DIV>
</DIV>From my friend=20

73. Judy:<?fontfamily><?param Arial><?x-lad-bigger>

Hi Folks,
My =

74. dear=20

75. friend, Beth O=92Neill has asked me to pass along information about our=20

76. dysfunctional Shoreline City Council. Beth and some other folks have =

77. been=20

78. working hard battling certain issues regarding an illegal rental in =

79. their=20

80. neighborhood. What should be a legal and zoning issue has gotten =

81. mired=20

82. into the politics of our =

83. 32<?x-lad-bigger><?fontfamily><?fontfamily><?param =

84. Arial><?x-lad-smaller>nd<?x-lad-smaller><?fontfamily><?fontfamily><?par=

85. ern Arial><?x-lad-bigger>=20

86. District Democrats and certain City Council folks are playing favorites =

87. with=20

88. their own political supporters.

Anyway, try to watch the =

89. latest=20

90. Council meeting (it airs at noon and 8pm every day on channel 21)'and =

91. try to=20

92. attend the next Council meeting at 6:30 next Monday in the Rainier Room =

93. at the=20
94. Shoreline Center. Beth has also asked me to let folks know that if they =
95. have any=20
96. questions to give her a call at: 546-5672 and to pass along the =
97. request=20
98. for lots of people to show up at the next Council =
99. meeting.
Judy

<?/x-lad-bigger><?/fontfamily>Coincidentally,=
100. I=20
101. talked to Beth today and then read the statement she presented to the =
102. city=20
103. council. This is very interesting and highly entertaining and I do =
104. suggest that=20
105. you make an effort to watch the city council meeting this week. (Now if =
106. I could=20
107. just get my channel switched off of Lake Forest=20
108. Park)
Diane</DIV></BODY></HTML>
109. —=_NextPart_000_001E_01C6DAF7.D46601B0—

EXHIBIT 2

1. Return-Path: <tootrd@comcast.net>
2. Delivered-To: mdonald9-1@zipcon.net
3. Received: (qmail 7834 invoked by alias); 30 Sep 2006 03:36:01 -0000
4. Delivered-To: mfimia@zipcon.com
5. Received: (qmail 7831 invoked from network); 30 Sep 2006 03:36:01 -0000
6. Received: from alnmhc13.comcast.net (206.18.177.53)
by mail.zipcon.net with ESMTP; 30 Sep 2006 03:36:01 -0000
7. Received: from computer1 (c-71-231-156-105.hsd1.or.comcast.net[71.231.156.105])
by comcast.net (alnmhc13) with SMTP
id <20060930033433b130017206e>; Sat, 30 Sep 2006 03:34:33 +0000
8. From: "Lisa Thwing" <tootrd@comcast.net>
9. To: "Maggie Firnia" <mfimia@zipcon.com>
10. Subject: FW: Current city council meeting being broadcast this week
11. Date: Fri, 29 Sep 2006 20:34:47 -0700
12. Message-ID: <BLEHILNGBEBLEAIAOPHCGEPBCJAA.tootrd@comcast.net>
13. MIME-Version: 1.0
14. Content-Type: multipart/alternative;
boundary="====_NextPart_000_007D_01C6E406.B45AE3F0"
15. X-Priority: 3 (Normal)
16. X-MSMail-Priority: Normal
17. X-Mailer: Microsoft Outlook IMO, Build 9.0.2416 (9.0.2910.0)
18. Importance: Normal
19. X-MimeOLE: Produced By Microsoft MimeOLE V6.00.2900.2962
20. This is a multi-part message in MIME format.
21. —=_NextPart_000_007D_01C6E406.B45AE3F0
22. Content-Type: text/plain;
charset="Windows-1252"
23. Content-Transfer-Encoding: 8bit
24. —Original Message—
25. From: Lisa Thwing [mailto:tootrd@comcast.net]
26. Sent: Monday, September 18, 2006 7:56 AM
27. To: Lisa Thwing
28. Subject: Current city council meeting being broadcast this week
29. From: Diane Hettrick
30. Sent: Thursday, September 14, 2006 11:40 PM
31. Subject: Current city council meeting being broadcast this week
32. From my friend Judy:
33. Hi Folks,
34. My dear friend, Beth O'Neill has asked me to pass along information about
35. our dysfunctional Shoreline City Council. Beth and some other folks have
36. been working hard battling certain issues regarding an illegal rental in
37. their neighborhood. What should be a legal and zoning issue has gotten
38. mired into the politics of our 32nd District Democrats and certain City
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41. every day on channel 21) and try to attend the next Council meeting at 6:30
42. next Monday in the Rainier Room at the Shoreline Center. Beth has also asked
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46. Judy

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48. presented to the city council. This is very interesting and highly
49. entertaining and I do suggest that you make an effort to watch the city
50. council meeting this week. (Now if I could just get my channel switched off
51. of Lake Forest Park)
52. Diane

53. —= _NextPart_000_007D_01C6E406.B45AE3F0

54. Content-Type: text/html;

charset="Windows-1252"

55. Content-Transfer-Encoding: quoted-printable

56. <!DOCTYPE HTML PUBLIC "-//W3C//DTD HTML 4.0 Transitional//EN">

57. <HTML><HEAD>

58. <META http-equiv=3DContent-Type =

59. content=3Dtext/html; charset=3DWindows-1252>

60. <STYLE></STYLE>

61. <META content=3D"MSHTML 6.00.2900.2963" name=3DGENERATOR></HEAD>

62. <BODY id=3DMailContainerBody=20

63. style=3D"PADDING-LEFT: 10px; FONT-WEIGHT: normal; FONT-SIZE: 10pt; =

64. COLOR: #000000; BORDER-TOP-STYLE: none; PADDING-TOP: 15px; FONT-STYLE: =

65. normal; FONT-FAMILY: Verdana; BORDER-RIGHT-STYLE: none; =

66. BORDER-LEFT-STYLE: none; TEXT-DECORATION: none; BORDER-BOTTOM-STYLE: =

67. none">20

68. leftMargin=3D0 topMargin=3D0 acc_role=3D"text" CanvasTabStop=3D"true">20

69. name=3D"Compose message area">

70. <DIV> </DIV>

71. <DIV class=3DOutlookMessageHeader dir=3Dltr align=3Dleft><FONT =

72. face=3DTahoma=20

73. size=3D2>-----Original Message-----
From: Lisa Thwing=20

74. [mailto:tootrd@comcast.net]
Sent: Monday, September 18, 2006 =

75. 7:56=20

76. AM
To: Lisa Thwing
Subject: Current city council =

77. meeting=20

78. being broadcast this week

</DIV>

79. <DIV> </DIV>

80. <DIV>

81. <DIV style=3D"FONT: 10pt arial; PADDING-TOP: 10pt">

82. <DIV>From: <A title=3Dmailto:dhettick@earthlink.net=20

83. href=3D"mailto:dhettick@earthlink.net">Diane Hettick </DIV>

84. <DIV>Sent: Thursday, September 14, 2006 11:40 PM</DIV>

85. <DIV>Subject: Current city council meeting being broadcast this=20

86. week</DIV></DIV>

87. <DIV>
</DIV>From my friend=20

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89. dear=20

90. friend, Beth O=92Neill has asked me to pass along information about our=20

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 93. working hard battling certain issues regarding an illegal rental in =
 94. their=20
 95. neighborhood. What should be a legal and zoning issue has gotten =
 96. mired=20
 97. into the politics of our =
 98. 32<?/x-tad-bigger><?fontfamily><?fontfamily><?param =
 99. Arial><?x-tad-smaller>nd<?x-tad-smaller><?fontfamily><?fontfamily><?par=
 100. am Arial><?x-tad-bigger>=20
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 108. at the=20
 109. Shoreline Center. Beth has also asked me to let folks know that if they =
 110. have any=20
 111. questions to give her a call at 546-5672 and to pass along the =
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 113. for lots of people to show up at the next Council =
 114. meeting.
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 118. council. This is very interesting and highly entertaining and I do =
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 120. you make an effort to watch the city council meeting this week. (Now if =
 121. I could=20
 122. just get my channel switched off of Lake Forest=20
 123. Park)
Diane</DIV></BODY></HTML>
 124.====_NextPart_000_007D_01C6E406.B45AE3F0--

CERTIFICATE OF SERVICE

I, Darcy Greenleaf, certify under penalty of perjury that true and correct copies of the above attached document were delivered as follows:

Ramsey Ramerman
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299
Via U.S. Mail and E-mail [RameR@foster.com]

Michael Brannan
Law Office of Michael Brannan
555 Dayton St., Suite H
Edmonds, WA 98020
Via U.S. Mail and E-mail [mgbrannan@seanet.com]

Michele Earl-Hubbard
Allied Law Group LLC
2200 Sixth Avenue, Suite 770
Seattle, WA 98121
(206) 443-0200
Via U.S. Mail and E-mail Michele@alliedlawgroup.com

David Norman
Allied Law Group LLC
2200 Sixth Avenue, Suite 770
Seattle, WA 98121
(206) 443-0200
Via U.S. Mail and E-mail David@alliedlawgroup.com

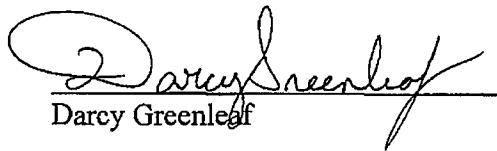
Chris Roslaniec
Allied Law Group LLC
2200 Sixth Avenue, Suite 770
Seattle, WA 98121
(206) 443-0200
Via U.S. Mail and E-mail Chris@alliedlawgroup.com

William John Crittenden
Attorney at Law
927 N. Northlake Way, Suite 301
Seattle, WA 98103
Via U.S. Mail and E-mail [wjcrittenden@comcast.net]

Gary T. Smith
Seattle City Attorney's Office
P. O. Box 94769
Seattle, WA 98124-4769
Via U.S. Mail and E-mail [Gary.Smith@Seattle.Gov]

Patrick Denis Brown
Attorney at Law
6112 24th Avenue N.E.
Seattle, WA 98115-7029
Via U.S. Mail

Executed at Shoreline, Washington, this 29th day of June 2009.


Darcy Greenleaf

OFFICE RECEPTIONIST, CLERK

To: Darcy Greenleaf
Cc: Ramsey Ramerman; mgbrannan@seanet.com; michele@alliedlawgroup.com;
David@alliedlawgroup.com; Chris@alliedlawgroup.com; wjcrittenden@comcast.net;
Gary.Smith@seattle.Gov
Subject: RE: City of Shoreline's Supplemental Brief

Rec'd and filed @ 4:53 p.m on 6/29/09

From: Darcy Greenleaf [mailto:dgreenleaf@shorelinewa.gov]
Sent: Monday, June 29, 2009 4:53 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Ramsey Ramerman; mgbrannan@seanet.com; michele@alliedlawgroup.com; David@alliedlawgroup.com;
Chris@alliedlawgroup.com; wjcrittenden@comcast.net; Gary.Smith@seattle.Gov
Subject: City of Shoreline's Supplemental Brief

Here for filing is Respondent City of Shoreline's Supplemental Brief in the case of O'Neill v. City of Shoreline, et al., Cause No. 82397-9.

This is being filed by Flannary Collins, counsel for Respondent City of Shoreline. Her phone number is 206-801-2222. Her WSBA number is 32939 and her e-mail address is fcollins@shorelinewa.gov. I am her assistant, Darcy Greenleaf, and my e-mail address is dgreenleaf@shorelinewa.gov.

*Darcy Greenleaf
City Attorney's Office
City of Shoreline
17544 Midvale Avenue N.
Shoreline, WA 98133
(206) 801-2223 New Phone Number
(206) 546- 2200 FAX*